ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of	)	
	)	
Petition for Declaratory Ruling Regarding Whether Certain CMRS Practices Violate the Communications Act	)	**WT Docket No. 00-164**

To: The Wireless Telecommunications Bureau

COMMENTS OF EXCEL COMMUNICATIONS

Excel Communications ("Excel"), on behalf of its operating affiliates, by its attorneys, respectfully submits these comments in response to the above-captioned petition for declaratory ruling (the "White Petition").[1] The White Petition seeks a ruling from the Commission that the following practices in the commercial mobile radio service ("CMRS") are unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 201(b): (i) measuring the initiation of a call from the time the "send" or similar button is pressed, including for "dead" air time; (ii) charging for excessive ring time in unconnected calls; and (iii) "rounding up" all such charges to the next higher minute. The White Petition further asks the Commission to rule that Section 207 of the Act, 47 U.S.C. § 207, permits a claim for damages against such practices to be made in Federal court. For the reasons below, Excel urges that the White Petition be denied.

[1] *See* FCC Public Notice DA 00-2083, released September 20, 2000.

I. THE CMRS RATEMAKING PRACTICES AT ISSUE ARE NOT UNJUST OR UNREASONABLE

A. The Issue Before The Commission Is the Reasonableness of Certain Ratemaking Practices

The Petitioners in the instant proceeding are plaintiffs in a class action suit brought in federal court against GTE Corporation and several of its wireless affiliates alleging unreasonable, unfair and deceptive CMRS billing practices.[2] This declaratory ruling petition was filed by the Petitioners as directed by the presiding U.S. District Judge, Honorable Richard A. Lazzara, pursuant to his finding that certain issues raised in the GTE Class Action should be referred to the Commission under the doctrine of primary jurisdiction.[3] Specifically, in Count I of their Third Amended and Restated Complaint ("Complaint"), the Petitioners alleged that "[t]he practice of charging for for (sic) all airtime on a Rounded Up basis is unjust and unreasonable, and therefore unlawful, under the provisions of 47 U.S.C. 201(b)."

The Court referred the issue to the Commission based on a determination that Count I of the Complaint challenged the reasonableness under Section 210(b) of the Act, not of the failure to disclose a billing practice, but of the billing practice itself.[4] This distinction is obscured in the White Petition, in which the Petitioners argue that they have not challenged the reasonableness *per se* of the rounding-up method, but rather the failure of GTE to abide by its customer contracts. Petitioners state that:

> all that has to be decided by the FCC is whether GTE's admitted conduct of rounding up the time of each call to the next whole minute and charging for that whole minute: (1) breached the unambiguous Contract, drafted by GTE, **because such charges**

---

2 *James J. White, et al. v. GTE Corporation et al.,* Case No. 97-1859-CIV-T-26C (M.D. Fla. Filed Oct. 29, 1998) ("GTE Class Action").

3 GTE Class Action, Order (October 1, 1999), pp. 7, 10.

4 *Id.* at 5.

> **were not permitted by, and were in conflict with, the terms of said Contract**; and (2) were "unjust" practices, in violation of § 201(b) of the Communications Act, **because (i) such charges were not permitted by, and were in conflict with, the terms of the Contract, (ii) such charges result in the consumer paying for phantom services not received, and (iii) such charges result in unjust and arbitrary billing to the consumer (charging the same price for calls of different length is unreasonable).** (Emphasis supplied.)

It is clear that, notwithstanding the Petitioners' urging to the contrary, issues of breach of contract or deceptive or unfair practices due to improper disclosure under the facts of the GTE Class Action are not at issue here. Rather the only issue properly presented for the Commission's consideration under Count I of the Complaint is the reasonableness of CMRS ratemaking practices such as rounding up.

B. Under Section 332(c)(3)(A) of the Act the Commission Has Jurisdiction Over CMRS Ratemaking Practices

As summarized in the Southwestern Bell Order, the Commission has been upheld in its interpretation that, pursuant to Section 332(c)(3)(A) of the Act, states generally can not regulate rates and entry requirements for CMRS providers, except if a substitutability finding is made in connection with universal service programs or a petition is filed with the Commission and certain statutory requirements regarding substitutability or unjust market rates are met.[5] Thus, the issue of the reasonableness of the CMRS ratemaking practices in question is squarely in the hands of the Commission.

---

[5] *See* Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, FCC 99-365, Memorandum Opinion and Order, 14 FCC Rcd 19898 (1999) ("Southwestern Bell Order") at 19901, citing *Texas Office of Public Utilities Counsel, et al. v. FCC*, 183 F.3d 393, 432 (5th Cir. 1999).

C. The CMRS Ratemaking Practices At Issue Are Not *Per Se* Unreasonable

1. CMRS Rates Are Deregulated

The reasonableness of CMRS ratemaking practices is assured by the checks and balances of a competitive market. In forbearing from tariff regulation of CMRS operators, the Commission implemented Congressional and Commission policies favoring reliance on market forces over regulation to ensure the reasonableness of CMRS rates.[6] The Commission has cautioned that, it does not "view the statutory preference for market forces rather than regulation in absolute terms."[7] However, as long as the basic tests for reasonableness of rates themselves are met, any unreasonableness of the implementation of rates in any particular case should be left to resolution under state contractual or consumer fraud laws.

Excel urges the Commission to hold consistently to these basic principles. The Commission should affirm that ratemaking practices such as those complained of by Petitioners are well within the discretion of competitive CMRS providers to apply and are not *per se* unreasonable.

Furthermore, to stem the tide of numerous similar class action suits and claims against CMRS providers, the Commission should reassert its confidence in the competitive market to

---

6 Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-25, Second Report and Order, 9 FCC Rcd 1411 (1994). *See also*, Wireless Consumers Alliance, Inc., Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, WT Docket No. 99-263, Memorandum Opinion and Order, FCC 00-292, released Aug. 14, 2000 ("WCA Order").

7 *See* Southwestern Bell Order at 19903, citing Petition of New York State Public Service Commission to Extend Rate Regulation, Order, 10 FCC Rcd 8187, (1995) ("NY State PSC Order") at ¶19.

define the boundaries of reasonableness of CMRS ratemaking practices. Any other decision would embroil the Commission in the fine details of CMRS business plans and pricing, which is exactly what the Commission's detariffing policy has sought to avoid. The Commission has clearly stated that:

> A mandatory detariffing regime, when applied to both CMRS and other nondominant carriers, constitutes a totally different framework for fulfilling our statutory responsibilities. We do not set CMRS rates or require that carriers only charge rates as filed. Rather than file tariffs to establish the legally effective rates (and other terms and conditions) for their offering, CMRS carriers enter into service contracts with their customers. We rely on the competitive marketplace to ensure that CMRS carriers do not charge rates that are unjust or unreasonable, or engage in unjust or unreasonable discrimination.[8]

The Commission has made plain that it is not in the public interest to regulate CMRS rates, and the White Petition offers no rationale for altering that policy.

2. The Commission Has Previously Determined that Rounding Up Is Reasonable

In the Southwestern Bell Order, the Commission expressly determined that the practice of charging on a rounded-up, whole minute basis is a common billing practice for interexchange services as well as CMRS. Further:

> The Commission has never questioned the lawfulness of this industry practice for the provision of CMRS, and rounded-up, whole minute billing has never been found by the Commission to be violative of Section 201(b).

Agreeing with Southwestern Bell Mobile that "charging for calls on a whole minute basis 'is a simplified method on which to base charges which still reflects general costs,'" the Commission expressly ruled that the practice of rounding up is not unjust or unreasonable under Section

---

[8] WCA Order at 13.

201(b) of the Act.[9] There is no justification for achieving a different conclusion here. Rounding up is a long-established and well-accepted industry practice, and there is absolutely no basis for a finding that it is *per se* unjust or unreasonable.

3. The Practices of Charging Customers For "Dead Time", Charging For Unanswered or Unconnected Calls, and Measuring a Call From the Press of the "Send" Button Are Reasonable To Recover Costs

As argued by Southwestern Bell Mobile, the accepted tests for the reasonableness of a rate are that it should be "reasonably related to the cost of providing service,"[10] and should "reflect or emulate competitive market operations."[11] In accordance with those tests, in the Southwestern Bell Order the Commission ruled that the common practice of CMRS operators to charge for incoming calls is not a *per se* violation of Section 201(b) of the Communications Act. Specifically, the Commission agreed with Southwestern Bell that these charges are justified by the fact that CMRS providers incur switching and transport costs for incoming calls, and that CMRS providers have the discretion, consistent with Section 201(b), to implement such charges for their services. Absent the ability to charge for incoming calls, the charges for outgoing calls would be higher. The same is true with respect to the ratemaking practices at issue here.

The issues raised by CMRS charges for "dead time", charges for unanswered or unconnected calls, and measuring calls from the press of the "Send" button are virtually indistinguishable from those raised by incoming calls. In all cases, CMRS operators incur costs for the use of their equipment as well as for the lost opportunity of carrying other calls. These are widespread industry practices which have become familiar to the user public.

---

9 Southwestern Bell Order at 19903-04.

10 *Id.* at 19903, referring to Southwestern Bell cite to United States Transmission Systems, Inc. (Revision to Tariff F.C.C. No. 1), 66 FCC 2d 1091, ¶ 5 (1977).

11 *Id.*, referring to Southwestern Bell cite to NY State PSC Order at ¶ 17.

D. Petitioners' Claims Do Not Support A Finding That Any Particular CMRS Provider's Rates are Unreasonable

As discussed, to support a claim of unreasonableness under Section 201(b) of the Act, Petitioners must demonstrate that the particular rates charged are not related to costs. Petitioners have completely failed to make the requisite demonstration. A breach of contract claim simply does not support a finding under Section 201(b) of the Act of that any particular CMRS provider's rates are unreasonable. Therefore, the Commission has not been presented with any evidence to justify a finding that a specific CMRS provider's rounded-up rates are unreasonable.

Therefore, because the practices are not *per se* unjust or unreasonable, and because no case has been made that any particular CMRS provider's ratemaking practices are unjust or unreasonable, the White Petition should be denied.[12]

II. CONSUMER PROTECTION CONCERNS MAY BE ADDRESSED AT THE STATE LEVEL

In this case, the Petitioners have stated that the GTE Class Action "challenges GTE's contract practices, not GTE's rates."[13] It is clear that Petitioners view their own claim as one grounded in breach of contract and inadequate disclosure. In this regard, the Petitioners seem to want the Commission to answer a very different question than the Court has directed be asked. Whereas the Court expects the Commission to address the merits of Count I of the Complaint, which is plainly addressed to the reasonableness of CMRS rates, the Petitioners themselves have expressly asked the Commission to find that GTE has breached its contractual obligations to its

---

12 Because no demonstration has been made that the CMRS ratemaking practices complained of are unjust or unreasonable, the Petitioners' separate request that the Commission rule that Section 207 of the Act permits a claim for damages in Federal court for unreasonable rates is moot.

13 White Petition at 5.

customers and that such breach, rather than the rates charged themselves, are unjust and unreasonable.

Although Section 332(c)(3) of the Act generally bars state regulation of CMRS rates, the Commission recently has clarified its view that states retain jurisdiction over "other terms and conditions" of commercial mobile services.[14] In particular, claims concerning violations of state consumer fraud, tort and contract or laws validly may be brought before state authorities. In fact, in their Complaint, Petitioners separately alleged violation of the Florida Deceptive and Unfair Trade Practices Act.[15] Thus, to the extent that Petitioners seek a ruling on GTE's compliance with state consumer protection and/or contract laws, their claim is properly made to state authorities, not to the Federal Communications Commission.[16] Consequently, the Petitioners' apparent request that the Commission adjudicate a claim of breach of contract or unfair business practices should be denied and Petitioners should be directed to pursue the matter with appropriate state authorities.

---

14 *Id.* at 8-9 (clarifying that even such claims brought for money damages are not barred as retroactive ratemaking).

15 White Petition at 6.

16 In fact, under similar circumstances, the Commission has clearly stated that it cannot rule on the question of whether ratemaking practices are consistent with the terms of any CMRS provider's specific service contracts or whether any CMRS provider has failed to adequately disclose such practices in violation of state consumer and fraud laws. See Southwestern Bell Order at 19900.

III. CONCLUSION

For the reasons stated, Excel respectfully requests that the White Petition be denied in its entirety.

Respectfully submitted,

EXCEL TELECOMMUNICATIONS, INC.

By: _____

Aileen A. Pisciotta
Robert Aamoth
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W. Suite 500
Washington, D.C. 20036
202-955-9600

Its attorneys

Dated: October 20, 2000

CERTIFICATE OF SERVICE

I, Beatriz Viera, hereby certify that a true and correct copy of the foregoing **Comments of Excel Telecommunications, Inc.** was delivered by hand or regular mail this 20th day of October 2000, to the individuals on the following list:

Thomas Sugrue
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, DC 20554

Susan Kimmel
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 8-B201
Washington, DC 20554

ITS
1231 10th Street, N.W.
Washington, DC 20036

James A. Staack, Esq.
Staak & Simms, P.A.
121 N. Osceola Avenue, 2nd Floor
Clearwater, FL 33755

James M. Landis, Esq.
Foley & Lardner
100 North Tampa Street
Suite 2700
Tampa, FL 33601

Peter Kontio, Esq.
Alston & Bird LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

Andre J. Lachance
GTE Service Corporation
1850 M Street, N.W.
Washington, DC 20036

Frederick M. Joyce, Esq.
Alston & Bird
601 Pennsylvania Avenue, N.W.
North Bldg., 11th Floor
Washington, DC 20004-2601

B. Viera

Beatriz Viera